United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6150

In The

United States Court of Appeals

For The Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

vs.

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES,
Defendants-Appellants,

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' and MASON BUILDERS ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS,
Defendants,

and

JOSEPH ERSKINE and LAWRENCE MORRISON,
Appellants.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS

DORAN COLLERAN O'HARA
POLLIO & DUNNE, P.C.
Attorneys for Defendant-Appellant Local 14 International Union of Operating Engineers
1461 Franklin Avenue
Garden City, New York 11530
(516) 248-5757

ROBERT L. O'HARA
ROBERT A. KENNEDY
Of Counsel

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TABLE OF CONTENTS

Cases Cited

Statutes Cited

UNITED STATES COURT OF APPEALS
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff-Appellee,

-against-

LOCAL 14, INTERNATIONAL UNION OF
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----------X

76-6150

BRIEF FOR APPELLANT, LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS

Questions Presented

1. Whether Local 14's reliance on the amount of experience an applicant had on the machinery within the Local's jurisdiction and its reliance on the New York City licensing requirements as prerequisites for admission to the union are justified by a showing of a compelling business purpose necessary for the safe and efficient operation of the Local's business.

2. Whether the lower court's affirmative relief in many particulars exceeded the relief needed to cure the alleged past discrimination presented by the record.

3. Whether the percentage goal of 36% reached by the trial court is consistent with prior goals reached in this circuit.

Preliminary Statement

In an action commenced against Local 14-14B and Local 15, 15A, 15B, 15C and 15D of the International Union of Operating Engineers under the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. [hereinafter "The Act"], Local 14 appeals from an order and judgment of the United States District Court, Southern District of New York (Tenney, J.), entered on September 1, 1976, which found, after a trial on liability only, that Locals 14 and 15 have engaged in and are engaging in a pattern and practice of discrimination and of resistance to full enjoyment by non-white and Spanish-surnamed workers of rights secured to them under the Act, 42 U.S.C. §2000e-2(c) and §2000e-2(d) and accordingly ordered certain and specific affirmative injunctive relief (JA 70, JA 123-124, JA 239-271)*. The jurisdiction of the District Court was based on 28 U.S.C. §1345 and 42 U.S.C. §2000e-6(b). The jurisdiction of this Court to hear this appeal is based on 28 U.S.C. §1291.

*All references to "JA" are to pages in the Joint Appendix; all references to "Tr" are to pages in the transcript of the trial testimony; all references to "Ex" are to exhibits submitted into evidence at the trial.

Nature of the Case

In its complaint the Equal Employment Opportunity Commission [hereinafter "EEOC"] alleged a pattern or practice of resistance to the Act in a number of areas including (i) the admission practices of Locals 14 and 15; (ii) the Locals' referral practices; (iii) the Locals' interference with contractors' minority recruitment; (iv) the Locals' interference with contractors' affirmative action compliance; (v) the Locals' failure to take reasonable steps to make known to non-white and Spanish surnamed workers the employment opportunities in the trades under their jurisdiction; and (vi) the Locals failure to take reasonable steps to overcome the effects of past socially discriminatory policies and practices (JA 7-15).

The complaint, in addition to naming Locals 14 and 15 as party defendants, joined a number of contractor associations as named defendants. The contractor associations were joined, however, for purposes of relief only under Rule 19(a) F.R.C.P. (JA 11-12).

Course of Proceedings below

A trial expressly limited to the issue of liability was held before the District Court, Southern District of New York (Tenney, J.) (JA 31). Only the Union defendants

participated in the trial. The court issued an opinion on May 6, 1976 finding that Locals 14 and 15 had violated the Act (JA 70-127). Thereafter, on July 26, 1976 the Court heard argument from counsel for the respective parties on the various proposed orders noticed for settlement. At the outset of that hearing, the Court indicated that the Government's proposed order would be the basis for the court's order (JA 130-131, JA 142). The Court was not receptive to counsel for Local 14's reminder that while the issue of liability had been resolved no evidentiary hearings had been conducted on the issue of relief (JA 145-146). EEOC's proposed order, with some minor modifications, was signed and entered by the court on September 1, 1976 (JA 239-271). Notwithstanding the broad affirmative action mandates of the order, no evidentiary hearing was ever conducted on the issue of relief.

FACTS

Local 14 has been engaged since 1937 in the operation and maintenance of equipment which is used on building construction, heavy construction and tunnel work (JA 38). Local 14's work jurisdiction is geographically limited to the five boroughs of the City of New York and the work is performed in the public sector (JA 77, 79).

Local 14B was independently chartered as an organizing Local in 1938 and since that time has been engaged principally in the operation and maintenance of equipment used in scrap yards, brick yards and in stevedoring operations within the City (JA 38). This work is performed in the private sector and consequently is not within the jurisdiction of the municipal licensing authority (Tr 404, Tr 578).

Local 14-14B [hereinafter collectively referred to as "Local 14"] has a total membership of approximately 1555 members of whom 44 are non-white or Spanish surnamed (JA 85, Tr 379). Of this total membership figure, there are approximately 900 to 1,100 active members (Tr 379, Tr 416, Tr 588). The remaining members are retirees who work either on rare occasions or not at all (Plaintiff's Ex 91).

Under the By-Laws of Local 14, and prior to the order and judgment of the court below, a candidate for membership in the Local had to be licensed by the City of New York, had to have obtained a minimum of 200 days experience on heavy equipment and had to be able to perform satisfactorily on two or more specified pieces of equipment (Plaintiff's Ex 6A, p. 9; see also Plaintiff's Ex 112). In addition, an applicant who had no prior affiliation with any operating engineers' local had to have two members of Local 14 sponsor his admission (Tr 498; Plaintiff's Ex 6A, pp. 9-11).

The Licensing Requirement

From the testimony adduced at trial, it was established that as a general proposition between 75 and 95 percent of the equipment under Local 14's designated craft jurisdiction must, when operated on jobsites within the City of New York, be under the control of an operating engineer licensed by the City of New York (Tr 500, Tr 585-86, Tr 1825-1826, Tr 3838). Such percentage factors with respect to the utilization of licensed equipment within Local 14's jurisdiction were found to be a fact by the court below (JA 80).

While there is some machinery under Local 14's jurisdiction which does not require a City license to operate (Tr 3832-3833; JA 80), if that equipment is adapted to a lifting operation even that equipment will require a

license (Tr 3836). Additionally, as the court below found, an employer has the right under the terms of its collective bargaining agreement to move an employee from a non-licensed piece of equipment to a licensed piece of equipment on the same job site (JA 79).

There are approximately 1400 to 1500 cranes in the City which are registered with the Department of Buildings, all of which require a licensed operator (Tr 3838). On building sites, where hoisting equipment is utilized, every piece of equipment requires a license (Tr 3838-3839).

Such hoisting licenses have been organized by the City of New York into three categories. There is a basic hoisting machine license designated as an "A" license. This covers a hoist machine with a boom of up to 200 feet (Tr 427; Plaintiff's Ex 63). The "B" license covers hoisting machines of 200 feet and up and is merely an additional endorsement on the basic license (Tr 427; Plaintiff's Ex 63). The third type, or "C" license, is the cherry picker license (Tr 33, Plaintiff's Ex 63). This latter category is the only licensing provision which deals with machinery in Local 15's jurisdiction. The prior two categories deal exclusively with machinery in Local 14's craft jurisdiction.

The licensing test for the "A" license is broken down into two parts. There is a written examination prepared by the City of New York consisting of seventy short questions which involve areas of equipment operation with

which the applicant should be familiar if he is to efficiently operate the machine (Tr 1953-1954). The written examination is administered, proctored and graded by the City Department of Personnel (Tr 1943, Tr 1954). There are no members of Local 14 in the Department of Personnel (1954).

There is also a practical test which is administered by the Department of Personnel of the City of New York (Tr 1942, Tr 1954). The City tests on a crane, a tractor type of equipment like a bulldozer or front-end loader, and a compressor (Tr 1942). The City considers both the practical and written test to be job related (Tr 1943-1944). Moreover, there was no finding by the court below that such tests were not job related or that they were in any way discriminatory in nature or content.

In addition to the testing requirements, the City of New York requires that an applicant be 21 years of age, that he be able to read and write the English language and that he have at least two years experience as an oiler or an assistant to an operator on cranes, derricks or cableways (Plaintiff's Ex 63). The "A" test is given twice a year (Tr 1942). The examination for the "B" license is given once a year (Tr 1956).

The types of licenses which are required by the City of New York for equipment operated within Local 14's trade jurisdiction involves an attempt on the part of such

municipality to insure safety where the inefficient operation of this complex machinery could cause damage to personnel or to the structures involved, and a consequent danger to the public safety (Tr 1941). In a City like New York, multi-level construction is constantly undertaken in confined areas, surrounded by a mass of people and property. In the steel construction phase of the operating engineer's job, the danger is amplified (JA 274-279). An unqualified operator presents a real and substantial danger to ironworkers and other laborers on the job site (JA 274-279).

In addition, the equipment operated within Local 14's jurisdiction has significantly increased in cost and complexity since the end of World War II. It is not uncommon for a piece of machinery to be worth $250,000.00 and estimates on some equipment run from $500,000.00 and up (Tr 55, Tr 145, JA 274-279). Consequently, it is not uncommon for an employer to seek to hire an operating engineer who has worked for the employer in the past (Tr 671, Tr 785, JA 274-279). In fact, some employers maintain their own list of qualified engineers and attempt to employ directly from that list (Tr 786).

The broad scope of the licensing requirement leaves little leeway for the employment of a nonlicensed engineer in New York City. The possibility of employment of such an engineer is further diminished by the right of the

employer to shift an employee from one piece of machinery to another (Tr 657, Tr 673; JA 80). This is not only a common practice within the industry but a practice which the employers claimed was essential to the efficient utilization of an operating engineer as evidenced by the presence of this right in the collective bargaining agreements (JA 80). Moreover, the employers maintain the right, under the collective bargaining agreements, to reject any unqualified engineer (Tr 642, Tr 661, Tr 665).

The Experience Prerequisites to Local 14 Admission

The 200 day experience requirement on heavy equipment which was required for membership into Local 14 merely afforded an employer the assurance that the operator of its expensive and complex equipment had the qualifications to operate such equipment. Such requirement has not been used to preclude anyone from gaining admission to the Union. In fact, once the City license is obtained any applicant for membership or for a job will be sent out to work from the referral hall on permit if he is deemed to have insufficient experience (Tr 459, Tr 557, Tr 605). The applicant will be allowed to reapply for membership in 30, 60 or 90 days (Tr 557-558). In the interim, any non-qualified applicant for membership will be permitted to obtain the necessary work experience and receives full union wages with no payment made for his permit (Tr 421, Tr 557, Tr 1847). There is no testimony in the record which

would indicate that this requirement was applied differently to minorities than to whites, nor any testimony which would indicate that it ever operated to bar a licensed minority applicant (Tr 1788-1789).

The other membership requirement that the applicant have the ability to operate more than two pieces of equipment serves a dual purpose. It advances the needs of the employers and at the same time assures the members of Local 14 that they will be a viable economic entity (Tr 466, Tr 503-504, Tr 560-562, Tr 589). In the unrefuted opinion of various officials of Local 14 the ability to operate more than one piece of equipment is necessary to allow the Local 14 member to earn a living at his trade (Tr 466, Tr 503). This opinion has been borne out by the recent employment picture within the City which has seen the building construction industry grind almost to a complete halt. The Local, itself, to this end maintains a retraining facility for its members to allow them to improve their employment picture (Tr 560, Tr 580).

Again, once an applicant has obtained his license, he is allowed to work on a non-paying permit to obtain the requisite maneuverability on the various pieces of machinery within Local 14's jurisdiction (Tr 459, Tr 557, Tr 605). There is no testimony that this prerequisite was used to bar minority applicants from admission into Local 14.

The sponsor requirement is, likewise, neutral in practice and effect. The various witnesses who testified on Local 14's behalf who were minority members of the Local had little trouble in obtaining white or black members to sponsor their admission into the union (Tr 1849, Tr 1892, Tr 1926, Tr 2009, Tr 2041, Tr 2049).

The only obstacle to membership in Local 14 is the City licensing requirement. There is no evidence in the record, however, that this requirement was arbitrarily asserted as a bar to minority membership. Rather, it was a prerequisite evenly applied to all applicants (Tr 2095-2096). If an applicant didn't have a license, he was often told where he could apply for the license (Tr 436, Tr 1119). Union members assisted applicants regardless of race in their preparation for the City exam (Tr 1813, Tr 1844). Even union facilities, with the approval of the Local, were at times utilized by various minority individuals who sought experience on machinery within the Local's jurisdiction (Tr 1116, Tr 1917).

The Training of an Operating Engineer

Local 14 under its Charter does not have jurisdiction to maintain an apprenticeship or recruitment program (Tr 425; JA 97). Local 14 is an unincorporated association of journeymen operating engineers with proven skills in their trade. Historically, the necessary train-

ing and experience to become a member of Local 14 was obtained in basically four areas: (i) in the Army (Tr 611, Tr 1829-1836); (ii) as a member of Local 15, working as an oiler or maintenance man and then transferring into Local 14 (Tr 548-549, Tr 1789-1790, Tr 1976); (iii) in work areas within and without the City where licenses are not required (Port Authority projects, the Navy Yard, scrapyards, other states and foreign countries)(Tr 2000) and (iv) as a member of an operating engineer local outside of New York City (Tr 558-559).

The Local does not maintain a preference for any type of training, the requisite qualifications of course are evidenced by an ability to obtain a City license (Tr 558). Local 15, as found by the trial court, is not an apprentice local for Local 14 (JA 77). Experience has shown, however, that no more than approximately 50 percent of Local 14's members are transferees from Local 15 (Tr 425, Tr 516-517, JA 77).

The experience of some of Local 14's minority members attests to the divergent sources of training for union membership. Stanley Drayton (Black) learned the operation of heavy equipment during his twenty year career in the United States Army (Tr 1829-1836). Eugene Howard (Black) learned to operate heavy equipment in New Jersey and in the New York shipyards (Tr 1885-86). Herman Lee (Black) obtained his training in the shipyards of New York and New

Jersey (Tr 2003-40). Herman Forbes (Spanish surnamed) worked with heavy equipment mainly in South America (Tr 2000). William E. Fulcher (Black) and Trevor Wisdom (Black) obtained their experience in Local 15 (Tr 1789-90, Tr 1976).

A similar work background is mirrored in the testimony of the Local 14 business agents. William Wade and Ralph Dalton obtained their experience in the predecessor unions of Local 15 (Tr 381, Tr 507-508). Everett Broderick and John Messinger transferred from Local 15 (Tr 548-549, Tr 599). Edward Murphy learned his trade in the Army (Tr 611).

The Referral Practices of the Local

Local 14 has no hiring hall agreement with any of the employer associations. An individual member of Local 14 is free to seek his own employment, and employers are also free to hire employees without any assistance from Local 14 (Tr 467, Tr 587, Tr 631, Tr 639-40, Tr 665, Tr 669-670). Approximately 70% of the members of Local 14 find their own employment (Tr 467, Tr 587-588). Due to the cost of the machinery and the need for proven qualified help, employers tend to use the same engineers on their various projects (Tr 786-789; JA 274-279).

Local 14 has historically shared space for their day room with Local 15 but the two locals have never maintained a "joint" hiring hall (Tr 470).

When an employer does call Local 14 for job assistance, the business agent determines who in the day room is best qualified for the job (Tr 568), although other factors such as time of unemployment do take on significance in periods of high unemployment (Tr 473).

The testimony of minority members of Local 14 established that they had never observed or heard of any racially discriminatory practices in the day room, nor had they been personally subjected to any (Tr 1795, Tr 1802, Tr 1843, Tr 1859, Tr 1985, Tr 2045, Tr 2049). EEOC presented no testimony regarding instances of job discrimination in referral by Local 14. Moreover, minorities had been since 1937 accorded treatment with respect to job referral equal to that of whites (Tr 481, Tr 1795, Tr 1802, Tr 1843, Tr 1859, Tr 2049, Tr 3113), and in fact, had been referred out ahead of whites in the hall (Tr 1899, Tr 2048).

The Trial

The Government presented evidence to establish a statistical imbalance between the ratio of minority members of Local 14 and the ratio of available minority workers in the job force within the five boroughs of New York City (Tr 201-222). The Government, however, presented no instances of individual discrimination by Local 14 beyond the statistical imbalance.

One minority witness testified to isolated instances

of discrimination and bribery with regard to one union official in 1941 (Tr 711-712). Another minority witness for the Government, who obtained his City license a week before testifying, merely stated that he was asked to work on permit in order to make sure that he could operate the machinery (Tr 817). Since there was no work on the day he attended the hall, the union took his number and informed him that he would be called should a work opportunity arise (Tr 807).

A third witness against Local 14 testified that after he received his New York City license he applied for membership in Local 14. He was then a member of Local 15 (Tr 1972). It took approximately two years to become a member of Local 14 because the work was slow (Tr 1975). At the time this witness put his name on the Local 14 list, there were white members of Local 15 who were also seeking to transfer into Local 14 (Tr 1975). These white members were also admitted into Local 15 at the same time as the minority applicant (Tr 1974-1975). In the interim he continued to work as an oiler in Local 15 (Tr 1976).

The witnesses for Local 14, most of whom were minority members of the Local, testified that they never have been subjected to a course of treatment at the hands of the Local which discriminated against them or deprived them of rights equal to those afforded white members (Tr 1795,

Tr 1802, Tr 1843, Tr 1859, Tr 1897, Tr 1903, Tr 1912, Tr 1985, Tr2048-2049, Tr 1987). Such minority members of the Local testified that they received the same wages, fringe benefits and job opportunities as non-minority members (Tr 1851, Tr 1979, Tr 1791-1792, Tr 1795, Tr 1796, Tr 1903). Moreover, the minority members of Local 14 have never been subjected to racially discriminatory practices with respect to their voting and other rights and privileges attendant to union membership (Tr 1851, Tr 1903, Tr 1798).

Although EEOC has charged Local 14 with discriminatory practices both prior and subsequent to 1964, since 1937 Local 14 had both black and Spanish surnamed members (Tr 57, Tr 495, Tr 533, Tr 608, Tr 626, Tr 1791, Tr 1809, Tr 1896, Tr 1926). There has never been an incident where a qualified black or Spanish surnamed individual has ever been denied membership in Local 14 (Tr 504, Tr 579, Tr 608, Tr 626), or denied a transfer into Local 14 from another operating engineer local (Tr 498, Tr 579, Tr 608).

The Opinion of the Court

The lower court found that both Locals 14 and 15 have engaged and are engaging in a pattern and practice of discrimination against non-white and Spanish surnamed workers in violation of the Act (JA 123-124).

With respect to Local 14, the Court below recognized that although certain equipment operated by Local 14 is specifically exempt from the licensing requirements of the City, on any particular project 75 to 95 percent of the

equipment under Local 14's craft jurisdiction must be operated by licensed engineers (JA 80). The court further found that the employers under the collective bargaining agreements did have the right to shift an employee from a non licensed piece of equipment to a licensed piece (JA 80).

The court found that "although there are instances where employers may initially hire non-union help directly, both unions effectively control work opportunities within their jurisdiction" (JA 82). This finding effectively ignores the open shop provisions found in the current collective bargaining agreements, as well as the explicit testimony of the employer contractors who testified that they had the right to employ operating engineers off the street (Tr 640).

The members of Local 14 were found to have no more than a high school education with no formal educational requirements for union membership (JA 85). Accordingly, the percentage of the minority labor force within the five boroughs of New York City 16 years of age or over with a high school education or less was computed at 36.39% (JA 86). There is testimony, however, that certain members of Local 14 had both a high school and a college education (Tr 494). Nevertheless, no attempt was made by the trial court to include such statistics into its quota or goal percentage.

The court went on to find that most people learned the operating engineer trade informally, "relying for their

training on friends or relations who are members of Local 14 to give instructions" (JA 97)). The court made no specific reference to the testimony of black and Hispanic witnesses such as Howard, Lee, Forbes and Drayton and merely grudgingly recognized that there are other ways to obtain experience (JA 97). Nevertheless the court found reliance on the pool of Local 15 members, with its purported discriminatory practices, and consequently found that these training and recruitment policies of Local 14 operated to discriminate against minorities (JA 98).

While previously conceding the broad scope of the City licensing requirement as it affected the Local 14 work jurisdiction, the trial court went on to contradict itself by finding that much of Local 14's equipment requires no license and that members frequently specialize in non licensed equipment (JA 98). This finding totally ignores the unrefuted testimony presented at trial that in a union comprised of an actual work force of approximately 1100 men that there are between 1400 and 1500 pieces of machinery within the City which require licensed operators (Tr 3838).

The fact that a man tends to specialize on any one piece of equipment, moreover, indicates nothing more than an individual preference to put all of one's eggs in one basket (JA 98). The member has already shown his proficiency in various areas and should be able to respond to an employer's

request to shift equipment should the occasion present itself. There is nothing in the record which would indicate that specialization occurs primarily in the non licensed area. But more importantly there was no testimony at the trial that would indicate that such factors were contrived for discriminatory purposes or that they had the effect of acting as a barrier to minorities.

The court attempts to justify its position in this regard by finding that many members of Local 14, once they acquire membership, fail to renew their licenses (JA 98-99). This finding underemphasizes the impact of the number of retirees and marginal workers on the figure utilized (Plaintiff's Ex 91). In addition, the administrative backlog of unprocessed license renewals within the Department of Buildings is effectively ignored (Tr 1681-1683). Moreover, the failure to renew a license on time results in a late charge of $3.00 (Tr 1674). It hardly places the tardy licensee, who has already demonstrated his entrance level qualifications, in the same category as an unlicensed applicant, as the court suggests.

The court went on to find that the membership requirements of Local 14 operate to discriminate against the admission of non whites and are not justified by business necessity (JA 99). Such finding was made despite the court's earlier finding that 75% to 90% of all equipment used on a job requires a license (JA 80). The court also referred to

occasions where Local 14 refused membership to qualified minorities with licenses, a finding totally without support in the record (Id.).

With respect to Local 14's referral practice, the court likewise found that it operated to discriminate against non whites (JA 100). This finding was made despite the fact that the government failed to produce one single witness to support such finding. The court apparently relied on its finding that the Union effectively controls work opportunities within its jurisdiction (JA 100). The testimony at trial reveals, however, that there was a negligible referral practice and that no minority member or non-minority member ever testified that he was discriminated against with respect to referrals (Tr 467, Tr 587-588). Almost 70% of the members of Local 14 fended for themselves when it came to seeking employment and such Local never had more than 300 men on permit at any time (Tr 587-588).

Finally, the court found that Local 14 had failed to participate in any affirmative action programs, and has effectively opposed and avoided its equal employment opportunity responsibilities (JA 103). Although there were approximately twenty "non compliance" show cause orders issued by the United States Environmental Protection Agency relating to the general position of operating engineer (Tr 3804), none ever resulted in a contractor being dismissed from a job site

(Tr 3814-3816). While some employers may blame the unions for failing to refer enough minority members to satisfy affirmative action programs, in dealing with expensive and dangerous machinery it is clear that most employers will not tolerate on the job training during ongoing construction projects considering that they have placed such a reliance on the journeyman character of the worker in the past (JA 274-279).

The Order and Judgment Appealed From

The final judgment herein permanently enjoined Local 14 from engaging in acts or practices which had the purpose or effect of discriminating in recruitment, selection, training, admission, referral, advancement or any terms or conditions of employment against any individual or class of individuals on the basis of race, color or national origin 239-240). The Local was enjoined from interfering with the employers' attempts to fulfill affirmative action obligations or from interfering with direct access by non whites into union membership by failing to administer a practical test six times a year as directed (JA 241).

The judgment, further, outlined an elaborate and cumbersome affirmative action program. A remedial racial goal of 36% was established, to be attained no later than September 1, 1981 (JA 242-243).

Despite the fact that Local 14 had no previous

complaints of discrimination an administrator was appointed at an hourly rate of $70 to overlook and supervise the administration of the order (JA 243-247). Moreover, the order charged the administrator with the disposition of all applications for membership into the union (JA 244). Additionally, the administrator was empowered to appoint hearing officers to aid him in the administration of every facet of the order and all complaints and questions of interpretation concerning the order were placed within the administrator's power to decide (JA 245). The administrator was also placed in charge of the back pay proceedings elaborated in the order (JA 245).

The unions were ordered to operate a single Hiring Hall with one Master Eligibility List and a joint Hiring Hall Sheet. The members of Local 14 would be able to obtain job referrals only from those lists and any member obtaining work other than by these mandated referrals would forfeit his right to work within the Union's jurisdiction for three months (JA 253). No member can any longer seek work directly from any contracting employer (JA 253) and no contracting employer may request for referral a specific individual save for a request of a master mechanic, foreman or deputy foreman or a minority referral in compliance with Federal, State or Local regulations or orders (JA 257-258).

Any problems with the qualifications of any work-

man are to be ultimately determined by the administrator or a person or body appointed by the administrator (JA 255-256).

All workmen must personally appear at the Hiring Hall each day that a referral is sought. A failure to report on any day causes the workman's name to be stricken from the list (JA 257).

Union contractors are, however, permitted to transfer workmen from job site to job site without the men registering in the Hiring Hall as long as there is no break in the continuity of employment. However, if any workman is laid off for more than three days, he must register for referral in the Hiring Hall for any future employment. The contractor is not allowed to further utilize his services unless he is eventually referred to the contractor in the normal course of referral (JA 261).

The order further requires the Locals to submit to the administrator plans for the conduct of separate training programs (JA 263). Once plans are approved, the Unions must provide training during non business hours and enrollees must not be restricted from working in lieu of attending training sessions and enrollees shall not be required to attend these sessions in order to be eligible for job referrals (JA 263).

Although the court below conducted no remedial hearings on any subject contained in the order and judgment, the court nevertheless concluded that training on one piece of

machinery is satisfactory for admission to membership and Local 14 must train with a view toward helping trainees pass the New York City test for Hoist Machine operators, license A (JA 264). The Unions were ordered, in addition, to submit a plan to the administrator for on the job training of non-whites (JA 264).

Moreover, the Union was ordered to provide the adminstrator with plans for a practical test for each piece of machinery within the Union's trade jurisdiction, with the tests requiring validation pursuant to EEOC guidelines (JA 264).

The administrator has discretion to require additional testing of minority members with a view towards the minority's attainment of "the minimum necessary skills" for an operating engineer, although the precise definition of a "minimal skill" in the context of a dangerous trade was never articulated (JA 265).

The judgment goes on to outline on elaborate back pay procedure (JA 265-268). Once a non white shows discriminatory treatment by the Union in at least one month the claimant will be able to receive back pay damages for any additional months in which he can prove that he was ready, willing and able to take work under Local 14's jurisdiction but worked or sought work elsewhere because of a reasonable belief that he would not be able to obtain work from the Union (JA 266-267).

The administrator was further charged with hearing

testimony on back pay and claimants were allowed to support their claim by sworn oral testimony, with no documentation necessary (JA 267).

The judgment establishes a claimant's eligibility date as the thirtieth day after the claimant's first application with the Union for either a job referral or assistance or union membership (JA 267). The claimant is entitled to receive from the respective Union full compensation for any health and welfare benefits incurred after the eligibility date, and pension credits, to which the claimant would have been entitled had the claimant been a Union member as of the eligibility date (JA 267).

POINT I

LOCAL 14'S RELIANCE ON THE AMOUNT OF EXPERIENCE AN APPLICANT HAD ON THE MACHINERY WITHIN THE LOCAL'S JURISDICTION AND ITS RELIANCE ON THE NEW YORK CITY LICENSING REQUIREMENTS AS PREREQUISITES FOR ADMISSION TO THE UNION ARE JUSTIFIED BY A SHOWING OF A COMPELLING BUSINESS PURPOSE NECESSARY FOR THE SAFE AND EFFICIENT OPERATION OF THE LOCAL'S BUSINESS.

EEOC must prove by a preponderance of the substantive evidence that Local 14 has engaged in a pattern and practice of discrimination in violation of Title VII. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972). Having alleged racial discrimination in employment practices EEOC must establish a prima facie case of discrimination before the burden of producing evidence shifts to Local 14. Buckner v. Goodyear Tire and Rubber Co., 339 F.Supp. 1108 (N.D. Ala. 1972); aff'd, 476 F.2d 1287 (5th Cir. 1973). In this connection the decisional law has permitted plaintiffs to establish a prima facie case through the use of statistical comparisons and exhibits. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). However, a defendant may overcome the prima facie case by producing credible, contradictory

evidence to justify the statistical imbalance, but is not required to produce a preponderance of such evidence. Ochoa v. Monsanto Co., 335 F.Supp. 53 (S.D. Tex. 1971), aff'd 473 F.2d 318 (5th Cir. 1973); U.S. v. International Union of Elevator Constructors, Local 5, 538 F.2d 1012 (3d Cir. 1976).

Although statistics demonstrating a racial imbalance permits the inference that a small minority membership in a union is a result of discrimination, the use of such statistics are, in such instances, accompanied by (1) the existence of supportive facts of discrimination and (2) the absence of variables which would undermine the reasonableness of such an inference. U.S. v. Ironworkers Local 86, et. al., 443 F.2d 544 (9th Cir. 1971) cert. denied, 404 U.S. 984 (1972); U.S. v. United Brotherhood of Carpenters and Joiners of America, Local 169, 457 F.2d 210 (7th Cir. 1972). Also, the weight to be given any inferences raised by statistics varies according to the overall comprehensiveness of the figures proffered. Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). This is especially true in the case at hand where a highly skilled and technical craft is concerned.

The record in this case, however, does not contain any additional facts which would support the in-

ference that the percentage difference between Local 14's minority membership and the minority population in the surrounding demographic area is the result of discrimination by Local 14. In this connection, EEOC has completely failed to sustain its burden of proving that prior to 1964, and continuing up to the present, minorities have been accorded unequal and different treatment by Local 14 than whites. The evidence presented to the court below by Local 14, apart from the work force statistics, makes unreasonable an inference that Local 14 conducts any of its affairs on a racially discriminatory basis.

Local 14 called as witnesses both black and Hispanic members of the Local. These witnesses testified that upon a showing of the requisite qualifications for the operation of the machinery within the Local's jurisdiction they experienced no problems in gaining admission into the Union (Tr 1903, Tr 2009-2011). Similarly, they could recount no instances of discrimination in Local 14's day hall (Tr 1795, Tr 1802, Tr 1843, Tr 1859, Tr 1985, Tr 2045, Tr 2049). In fact, they were referred out to jobs ahead of whites (Tr 1899, Tr 2048). Nor were they discriminated with respect to any other aspects of union membership (Tr 1791-1792, Tr 1795-1796, Tr 1851, Tr 1903).

Despite the unrefuted testimony of these minority

witnesses on such key issues, the trial court nevertheless inferred, from the statistical disparity introduced by EEOC that (1) the 1970 census regarding the male minority population sixteen years of age or over, without a high school education possesses the requisite skills necessary to efficiently and safely perform the special skills of the operating engineer and (2) the absence of the requisite "quota" of blacks and Hispanics in the membership of Local 14 indicated that such local was guilty of discriminatory practices.

The invalidity of such assumptions was articulated in Dobbins v. Electrical Workers Local 12, 292 F. Supp. 413 (S.D. Ohio 1968):

> "In some fields a prima facie case of pattern and practice is made out on a showing that given privileges are exercised only, or for the greater extent, by whites and that there is in an area a substantial Negro population and that there have been repeated attempts by Negroes to exercise such rights. Such is certainly true in the education and voting fields. However, we deal with a 'craft' union. It is one thing to presume or assume, prima facie-wise or otherwise, that a significant number of a group have the qualifications for schooling or voting, or jury service. It is another thing to assume prima facie-wise or otherwise, that because a certain number of people exist, be they white or Negro, that any significant number of them are lawyers or doctors, or merchants, or chiefs - or to be concrete, are competent plumbers or electricians, or carpenters. " 292. F.Supp. at p. 445

The record reflects that EEOC did not show the existence of a single minority applicant possessing the basic skills of this craft who was denied membership for a discriminatory reason. The admission of individuals to Local 14 is not automatic nor, concededly, is everyone from a particular group or groups eligible for employment as an operating engineer; the city licensing requirement made such accomplishments impossible.

Additionally, in each of the cases relied upon by the trial court, in finding a prima facie case of discrimination by statistical disparity there existed other overt acts of discrimination which justified the imposition of equitable remedies or goals to correct patterns of past and present discrimination. Griggs v. Duke Power Co. 401 U.S. 424 (1971) (jobs in question formerly had been filled by whites only; giving longstanding preference in employment to whites); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) (city test for supervisory positions in city school system held to be not job-related); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) cert. denied, 406 U.S. 950 (1972)(city fire department was all white with historical exclusion of minorities); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (defendant admitted to its unequal treatment of blacks in hiring, job assignment, apprenticeship

and selection of supervisors; discriminatory seniority and transfer practices); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971) cert. denied, 404 U.S. 984 (1972) (failure of union hiring hall to grant blacks referrals; unequal application of admission requirements) Parham v. Southwestern Bell Telephone Co., supra, (complete exclusion of blacks from particular job categories). The evidence in the instant case, as adduced from the black and Hispanic witnesses who went through the entire procedure, demonstrated the particular absence of any overt factors which would support such an inference of discrimination. Moreover, the testimony of Local 14's witnesses demonstrated that the Local has not, since its inception in 1937 to the present, engaged in discriminatory policies or practices against minorities.

The trial record in the instant case clearly supports the existence of those variables which undermine the reasonableness of the inference drawn from a statistical imbalance that such imbalance results from discrimination. An examination of the City's licensing requirements reveals the existence of the type of variable which refutes any inference of discriminatory behavior that might be concluded from statistics alone. Ochoa v. Monsanto Co., supra; U.S. v. International Union of Elevator Constructors, Local 5, supra.

Griggs v. Duke Power Company, supra., made it clear that Title VII was not intended to guarantee a job to every person regardless of qualifications. Rather, Congress required the removal of artificial, arbitrary and unnecessary barriers to employment which invidiously discriminate on the basis of racial or other impermissible classifications. However, if a practice is shown to be a job-related business necessity, it can withstand a Title VII challenge. This Circuit elaborated upon the Griggs holding when it defined "business necessity" as connoting an irresistible demand, requiring for its survival the fostering of the essential and legitimate goals of safety and efficiency with no less discriminatory reasonable alternative available. United States v. Bethlehem Steel Corporation, supra.

Local 14's work jurisdiction is the five boroughs of the City of New York, although its working membership is drawn from the greater New York metropolitan area (JA 77, JA 79). The equipment in Local 14's craft jurisdiction includes hoisting equipment and other pieces of heavy construction machinery (JA 38). The court recognized these facts and further recognized that on any particular construction project 75 to 95 percent of the equipment under Local 14's craft jurisdiction, when operated within the City of New York, has to be under the control of an operator licensed

by the City (JA 80). Additionally, the court found that employers have a right, under collective bargaining agreements, to transfer an operator from one piece of non-licensed equipment to another piece of equipment which does require a license (JA 80). More important, however, is the fact that there was no finding that the City examination for the type of licenses required by Local 14 for membership or work was not job related or that it was discriminatory in nature.

Historically, Local 14 has relied on various experience requirements for admission, particularly the obtaining of a New York City hoisting license after successful completion of both a written and practical test on Local 14's machinery (Tr 1942, Tr 1953-1954). The court found that these requirements operated to discriminate against the admission of non-whites and are not justified by business necessity (JA 116-117). This conclusion might have validity if the craft jurisdiction of Local 14 merely involved the performance of unskilled tasks requiring only minimal experience for the attainment of job skills. Equal Employment Opportunity Commission v. International Union of Elevator Constructors, 398 F. Supp. 1237 (E.D. Pa. 1975) aff'd 538 F.2d 1012 (3d Cir. 1976). However, the job of an operating engineer, particularly in the City of New York, involves the delicate

manuvering of large, powerful and expensive machines on congested construction sites surrounded by a bustling population of "civilians". In such a situation the two most significant factors for a successful operation must be safety and efficiency, the components of a valid business necessity. Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Title VII does not demand that an employee be placed in a position for which he is not qualified. Griggs v. Duke Power Company, sup a. But, it does require that any person who has demonstrated the skills required for the position to which they aspire should not be prevented from taking his rightful place on the basis of his race. Young v. Edgecomb Steel Company, 499 F.2d 97 (4th Cir. 1974). In this respect, Local 14 has always permitted all persons to take their rightful place within the Union, but only after such candidate has clearly demonstrated that he possesses the skill to safely and efficiently operate equipment in Local 14's jurisdiction.

In Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972), the plaintiff challenged the airline's job qualifications and testing procedures for the position of flight officer. The airline, which had only 13 black flight officers out of a total of 5,900, required that

applicants for flight officer (i) be a licensed pilot (ii) have 500 hours of flight time (iii) be between the ages of 21 to 29 years and (iv) possess a college degree, preferably in "hard sciences". Plaintiff was a licensed pilot. However, he did not satisfy either the flight time or college education requirements. The court found that the airline's job requirements were job related. The evidence showed that United Airlines, like Local 14, did not train applicants to become licensed, but rather required that they be licensed at the time of application. Additionally, the evidence also demonstrated that those applicants with more flight time were more likely to succeed on the job. The court found United's requirements to be an example of a business necessity.

With particular reference to the instant appeal, the court in Spurlock spoke of analogous problems of skill and safety:

> "United's flight officers pilot aircraft worth as much as $20 million and transport as many as 300 passengers per flight. The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his preemployment standards for such a job." 475 F.2d at 219.

The court went on to find that while a court might closely scrutinize employment prerequisites where necessary

job skills are minimal, a different situation obtains as the skills increase:

> "On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F.2d at 219.

In Rodriquez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974) the court rejected experience requirements of an employer for the transfer of city drivers to long-haul operations. However, the court did recognize the danger of permitting the operation of tons of trucking equipment at high speeds by unqualified drivers, and to diminish that danger the court held that a careful screening of the transferees should be instituted. In the present case, one slip or miscalculation on a piece of equipment could result in extensive personal injury or death and property damage.

The trial court never challenged the validity of the city licensing requirement as it related to the operation of the complex machinery within Local 14's jurisdiction. The only testimony in this regard was to the job relatedness of the various tests (Tr 1943-1944). Rather, the trial court found that the imposition of the City's licensing requirement as a prerequisite to Local 14 admission was invalid (JA 116-117). The court based this conclusion on its findings (i) that the members of Local 14

tend to specialize on unlicensed equipment, a finding totally without support in the record (JA 98); (ii) that much of Local 14's machinery is unlicensed in the first instance, a contradiction of undisputed facts and a prior finding (JA 98) and (iii) that many members of Local 14 fail to renew their license, a finding that says nothing about the qualifications necesssry to obtain that license in the first instance (JA 98-99). A man who inadvertently fails to renew his license does not become "unqualified" by that omission.

With regard to the failure to renew licenses, the court found that 456 of 1432 members failed to promptly renew their City licenses in 1973 (JA 98-99). This led the court below to conclude that the license requirement for membership and work was an artificial requirement for union membership. However, the plaintiff's figures included men who should have been excluded from the challenged category, that is: (1) 154 men who had absolutely no earnings for 1971, 1972 and 1973 and were obviously not employed as operating engineers (Plaintiff's Ex 91); (2) 35 men who had retired or withdrawn from the industry and departed from the New York area prior to the trial (Plaintiff's Ex 91); (3) 27 men who had retired or withdrawn from the industry but still resided in the New York area and who had no reported earnings for 1973. When these men, totalling 216, are deducted from

EEOC's figure the remaining allegedly "non-licensed" members of Local 14 were accounted for in the City's admitted processing backlog of 200 pending renewals (Tr 1681-1682). The few remaining men were characterized by Local 14's witness, Cyril Mahady, a 27 year license holder, who had simply forgotten to seasonably renew his license (Tr 2075). It is apparent that the court's finding in that regard was based upon an erroneous conclusion drawn from unsubstantiated facts.

It would seem clear that the successful passing of the City of New York's hoisting test must certainly (1) indicate clearly that those who possess such license have achieved the necessary job skills and traits for the successful operation of heavy hoisting equipment in the City and (2) is a factor which vitiates the inference of discrimination which the court drew solely from the statistical imbalance in the present case. United States v. Georgia Power Company, 474 F.2d 906 (5th Cir., 1973); U.S. v. Ironworkers Local 86, supra.

The operating engineer trade is a job requiring a high degree of skill. Engineers operate equipment worth many thousands of dollars in areas congested with people, equipment and material. The risks involved in using an unqualified operator in the City of New York are staggering. The public interest clearly dictates that qualified persons

operate these huge machines, and that great caution should be exercised before mandating a lowering of employment requirements for such a job. Spurlock v. United Airlines, Inc., supra. No reasonable alternative exists to the employment of qualified operating engineers.

POINT II

THE LOWER COURT'S AFFIRMATIVE RELIEF IN MANY PARTICULARS EXCEEDED THE RELIEF NEEDED TO CURE THE ALLEGED PAST DISCRIMINATION PRESENTED BY THE RECORD.

The courts in fashioning relief under Title VII have threaded a thin line between what have been termed "facially contradictory" provisions of the Civil Rights Act. Equal Employment Opportunity Comm. v. Local 638, 532 F.2d. 821 (2d Cir. 1976). On the one hand, the language of §703(j), 42 U.S.C. §2000e-2(j), specifically prohibited "preferential treatment" in hiring practices to correct a racial imbalance. Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622, 634-39 (2d Cir. 1974). On the other hand, 42 U.S.C. §2000e-5(g) vested the courts with broad discretion to order any affirmative action appropriate to remedy past discrimination.

A. The Referral Practices

The judgment mandated the joint operation of a hiring hall by both Locals 14 and 15 in total disregard of the individual status of the respective locals and notwithstanding the fact that the Locals had never previously operated a joint hiring hall. No hearings were

held on the issue of relief as was clearly mandated by the terms and conditions of paragraph 1 of the Pre-Trial Order (JA 31). Rather the court, to remedy past discrimination, imposed a mandatory system of referral which required every member to utilize the facilities of the hiring hall (JA 253). Anyone whose employment was terminated for more than a three day period, was required to find work exclusively from the hall (JA 261). He could not seek work directly from a contracting employer (JA 253), nor could an employer directly request the services of an operating engineer who had worked satisfactorily for that employer in the past (JA 257-258).

The Civil Rights Act specifically provides, at §703(h), 42 U.S.C. §2000e-2(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production as to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin..." (Emphasis added).

The Act was not intended to invalidate "bona fide" seniority systems. Chance v. Board of Examiners and Board of Education, City of New York, 534 F.2d 993 (2d Cir. 1976). Although the awarding of retroactive seniority to minority employees who have actually themselves suffered from discrimination at the hands of employers is, at times, appropriate under the courts' broad equitable powers (Franks v. Bowman Transportation Company, ___ U.S. ___, 47 L.Ed.2d 461 (1976)), there is no precedent under the Act for the wholesale destruction of a facially neutral and "bona fide" merit system, especially, where, as here, there are alternative remedial avenues. See Watkins v. United Steel Workers of Am., Local No. 2369, 516 F.2d 41 (5th Cir. 1975); Waters v. Wisconsin Steel Works of Int. Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

By requiring that any employee who had been working steadily for a contractor return to the hiring hall on the contingency of a three day hiatus between jobs, the order effectively deprived the operating engineers of seniority rights and merit rights accrued through years of service with any particular contractor.

From testimony adduced at trial, it was clear that referral was not the rule in obtaining work in this

trade (Tr 467, Tr 587-588), and when it was used, it was often based on a request for a specific individual who had worked for the employer in the past (Tr 786-789). It has long been the practice of members of Local 14, prior to this order, to locate job opportunities on their own initiative, with contractors who are signatories to the collective bargaining agreements (Tr 467).

In the building trades, there is not the traditional employer-employee relationship found in other facets of private industry. Long range employment is dependent on proven merit. The employer comes to know the quality of the work of the particular operating engineer and would continue to utilize the expertise of this known and competent worker. A system of seniority and merit was built within the building trades identical to the seniority or merit system in other industries.

Now, however, under the broad remedial brush of the lower court, the employer is not allowed to utilize the skills of this particular employee on the occasion of a fortuitous interval occurring between work opportunities. A lifetime of good will is effectively withdrawn from the employee and his seniority is neutralized.

The rationale surrounding this referral system is apparently its lossening effect upon the industry to open up

jobs for minority workers. However, in doing so the lower court is directly discriminating against a relatively small group of identifiable employees and depriving them of work opportunities for the benefit of minority workers, most, if not all, of whom, did not suffer actual instances of job discrimination at the hands of Local 14. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, rehearing en banc den, 531 F.2d 5 (2d Cir. 1975); Equal Employment Opportunity Comm. v. Local 638, supra.

The discretion of the lower court must certainly be questioned where, after a trial on liability only, no hearings were held on the issue of relief. The order contrary to the tenets of the Act, arbitrarily interfered with the rights of these employees when no such remedy need have been directly asserted against these otherwise innocent individuals. Recourse could have been made directly against the employers had the plaintiff chose to try the liability issue against them. The imposition of racial quotas against the employers, assuming the validity of such quotas, would have more directly created minority job opportunities. The attempt to create these opportunities through indirection through the instrumentality of a mandatory referral system in Local 14 is violative of §703(j) and §703(h) of the Act.

B. The Administrator

In an attempt to remedy the alleged past discrimination, the court below found it necessary (i) to lower if not eliminate the qualifications necessary to gain entry into a union of heretofore highly skilled employees, (ii) to impose a racial quota of 36% and (iii) to appoint an administrator to oversee the maze of bureaucratic procedures outlined in its judgment (JA 247-248, JA 242-243, JA 243-247). Since these remedies function to accomplish essentially identical objectives, the court was exercising remedial overkill.

The court in Equal Employment Opportunity Comm. v. Local 638, supra., 532 F.2d at 830-31, questioned the necessity of imposing fair job related tests for admission into a union apprenticeship program and at the same time retain artificial quotas to insure minority membership. This rationale against overlapping remedies would be equally compelling here.

The use of the City licensing requirement as a prerequisite for Local 14 admission was found to be non-job related by the Court below (JA 116-118). Accordingly,

standards for admission to the union were decidedly lowered (JA 247-248). Entrance into Local 14 can be accomplished under the present judgment by (i) a showing of fifteen days work in the trade jurisdiction of Local 15, (ii) successful completion of a practical test on one piece of Local 14 equipment, (iii) the possession of an "A","B", or even a "C" license, although with respect to the equipment covered in the latter category, Local 14's jurisdiction is negligible, (iv) the satisfactory completion of any union apprentice program, (v) the transfer from another operating engineers local, or (vi) employment in a non union shop thereafter organized by Local 14 (Id.). Consequently, the minority membership of allegedly qualified applicants will be insured in ways which do not require the punitive cost of an adminstrator or the imposition of an arbitrary racial quota.

In addition to the fact that the appointment of an administrator was not necessary to effect relief, in light of the present record, the appointment was inappropriate. In Equal Employment Opportunity Commission v. Local 638, supra, the appointment of an administrator was found to be "appropriate" where the union and its joint apprenticeship committee had wilfully failed to comply with a state court

order regarding racially discriminatory selection and admission practices. The state and federal court records against these defendants were replete with instances of union "bad faith" in delaying or preventing affirmative action. Defendants in that action had gone so far as to expend union funds for special training sessions designed to provide union members' friends and relatives with a competitive edge in taking the joint apprenticeship test. Defendants also unilaterally suspended court ordered time-tables for admission of forty non whites to the apprentice-ship program.

Focusing on this union "recalcitrance", this Court attempted to balance the need for union self government with the obvious need for third party supervision of the local:

> "The appointment of an administrator with broad powers over Local 28 and the JAC is clearly appropriate under the circumstances here. While union self-government is desirable and is, indeed, an ideal to which the law aspires, 29 U.S.C. §401, our interest in union self-government cannot immunize Local 28 from the conseq-uences of its actions. The apparent failure of the New York court order to change member-ship practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein's orders convince us

> that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs." 532 F.2d at 829.

In the case at hand, the record does not demonstrate such recalcitrance. There has been no finding of bad faith. There has been no finding concerning actual and specific instances of racial discrimination. This was a case of statistical imbalance and no pattern of invidious or egregious racial discrimination was found. Certainly this is not a case where the abridgement of union self-government should be permitted.

Furthermore, the court's abuse of discretion with regard to the appointment of an administrator is highlighted by the fact that no hearing was held on relief. The union was not allowed to show that it is presently in dire financial straits. There is in excess of 50% unemployment within the industry. The appointment of an administrator to supervise the internal affairs of the Local in light of such a finding would appear to be a last resort. The Local's good faith compliance with the judgment could be insured by the economic alternatives of non-compliance.

The appointment of an administrator at $70.00 per hour with broad supervisory duties is punitive in light of the record presently before the Court. The

affirmative relief available under §706(g) of the Act was not intended to be used as a vehicle to punish. Rondeau v. Mosinee Paper Corp., 95 S. Ct. 2069 (1975).

C. The Racial Quotas

The imposition of racial quotas to effect minority hiring is equally redundant in light of the extremely liberalized entrance level requirements promulgated by the court.

Similarly, the absence of a long and egregious pattern of past discrimination requires the removal of the racial quotas applied to Local 14. Kirkland v. New York State Dep't of Correctional Services, supra. The utilization of such a "goal" is often undertaken with great reluctance, stressing the temporary nature of the goals and the flagrant behavior being corrected. Equal Employment Opportunity Comm. v. Local 638, supra, 532 F.2d at 827.

The showing of a statistical imbalance in a trade of highly skilled workers falls short of establishing this clear pattern. The removal of proven job qualifications will do as much to increase the minority ratio in Local 14 as would an artificial racial quota.

D. Back Pay Procedure

The back pay procedure outlined in the court's

judgment was overly broad and constituted an abuse of discretion. The Government was unable to establish instances of discrimination on the trial record and even if they had, in this Circuit, there is no relief for the type of speculative claims to which the judgment seeks to respond. Equal Employment Opportunity Comm. v. Local 638, supra, 532 at 832.

The judgment would allow a minority discriminatee to recover for those months where he made no effort to seek work through the union (JA 266-267). Similarly, a minority member who attempted to obtain even one day's work within the jurisdiction of the Local would be made a member of the Union for the purpose of pension credits and welfare benefits (JA 267-268). This type of relief would transcend the "make whole" policy of the Act (Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d. at 461), and constitute a racial preference under §703(j).

A similar problem is presented by those portions of the judgment which allow a minority applicant in Local 14 to defer payment of his initiation fees until he commenced work and then to pay only on a prorated basis (JA 250-251) and even to defer admission into the Local (JA 252-253). To the extent that these benefits are not enjoyed by non minority members and are not necessary to effect complete

relief in this action, they constitute instances of reverse discrimination (§703(j)).

Notwithstanding the broad discretion which the courts possess in fashioning relief in a Title VII action, such discretion should not be exercised in a vacuum. Albermarle Paper Co. v. Moody, 422 U.S. 405, 451 L.Ed.2d 280, 295-96. Local 14 has approximately 1000 working members, yet in this period of high unemployment it has been charged with the responsibility of referring several thousand people to work on a daily basis. To compound the problem, the hiring hall is located in a residential area, with a general medical hospital in the surrounding neighborhood.

In addition, qualifications for work in the trade have been significantly lowered, yet no employer was consulted as to how such a reduction in qualifications would affect the industry. The employers, up until the time of this judgment, had exercised complete discretion in hiring. Neither the court nor the administrator was sufficiently couched in the workings of the industry to effectively turn the industry inside out. Yet that will be the precise effect of this judgment. These types of problems might well have been avoided had the trial court held a hearing on relief.

POINT III

THE PERCENTAGE GOAL OF 36% REACHED BY THE TRIAL COURT IS NOT CONSISTENT WITH PRIOR GOALS REACHED IN THIS CIRCUIT.

In view of the delicate constitutional balance that must be struck in the use of racial goals or quotas between the elimination of discriminatory effects (§706(g) of the Act) and the courts' involvement in unjustifiable reverse discrimination (§703(j) of the Act), "from the outset the court should be guided by the most precise standards and statistics available." Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A., 501 F.2d 622, 633 (2d Cir. 1974).

The courts of this Circuit have previously made use of a statistical analysis to obtain a percentage goal for minority membership when a local union has been held to be in violation of Title VII (Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A., 360 F.Supp. 979, mod 501 F.2d 622 (2d Cir. 1974) on remand 400 F.Supp. 983 (D.C.N.Y. 1975), Equal Employment Opportunity Commission v. Local 638, 401 F.Supp. 467, mod 532 F.2d 821 (2d Cir. 1976)), and, in doing so, have been guided by the direction of the Supreme Court that "[i]mportant national

goals would be frustrated by a regime of discretion that produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." Albermarle Paper Co. v. Moody, supra., 422 U.S. at 417.

The statistics introduced by EEOC and relied upon by the trial court, although they purport to deal with the same geographical area, and although they are derived from the same census data, differ markedly from those previously relied upon by this Court. While this Circuit affirmed a minority quota of 29%, based on the 1970 census data, for the five boroughs of the City of New York (Equal Employment Opportunity Commission v. Local 638, supra), the trial court below used the same data to support a 36% finding. Plaintiff in Local 638 had similarly alleged this 36% minority figure. Equal Employment Opportunity Commission v. Local 638, supra, 401 F.Supp. at 478, fn.12.

The computations employed in the instant case vary from prior decisions in that (1) they make use of the "labor force" statistics in place of "civilian labor force", thereby including men in the armed forces (Rios v. Enterprise Ass'n. Steamfitters Local 638, supra, 400 F.Supp. at 985), (2) no adjustment is made for that percentage of non-whites that are included twice in the

1970 census figures (i.e.) those Spanish-surnamed individuals who are also included under the category of "Black" (Rios v. Enterprise Ass'n. Steamfitters Local 638, supra, 400 F.Supp. at 986), (3) no adjustment is made for the percentage of the Spanish language population which is male as opposed to female (Equal Employment Opportunity Commission v. Local 638, supra, 401 F.Supp. at 492, App.1 and fn. "c"*) and (4) no adjustment is allowed for the percentage of union members nationwide that have attained more than 12 years of education (Rios v. Enterprise Ass'n. Steamfitters Local 638, supra, 400 F.Supp. at 986-987**).

It should be noted, that although the trial court below and the court in Rios (400 F.Supp at 987-88) applied an undercount figure, the court in Local 638 found it unnecessary to apply the factor since the inclusive Spanish language data offset any disadvantage suffered by undercount. Equal Employment Opportunity Commission v. Local 638, supra, 401 F.Supp. at 493 fn.j.

The above calculations were not considered by the court below although the court did make a finding that

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*The Spanish language figures in the Court's formula are based on total population. The population figure must be multiplied by 47.57 which is the Puerto Rican male factor assumed to be the Spanish language male factor.

**The education approach was refined in Local 638, see 401 F.Supp. at 493, subd. 4 and page 489, fn. 27.

"only persons with a high school education or less apply for work as operating engineers in New York City" (JA 105). The 1970 census figures indicated, however, that almost 4% of the occupational class of "cranemen, derrickmen and hoistmen" have obtained a higher level of education. See, 1970 Census of Population, Subject Reports, Occupational Characteristics, PC(2)-7A, Table 5. Moreover, there was testimony on the record that certain members of Local 14 had received a college education (Tr p. 494).

Local 14 contends that each of these factors should have been considered by the trial court to bring this case within the parameters of the prior decisions in this Circuit. The trial court, in relying upon EEOC's figures, failed to comply with any of the refinements developed in the Rios and the Local 638 cases.

The racial quota, moreover, should reflect the entire geographical area from which the work force is drawn. It was error for the trial court to limit the computation of the minority work force to the geographical area in which the work is performed (JA 85-86, JA 104). United States v. Hazelwood School District, 534 F.2d 805, 811 fn. 7 (8th Cir. 1976).

In finding a statistical imbalance in this case, the trial court was content with comparing a 2.8% minority

figure within the union as against a 36% minority work force figure. In terms of comparison of these two figures, there is a glaring distinction and the distinction is geographical. The 2.8% figure is derived from a comparison of minority members of the Local against total union membership. The residence of the members is not considered. The 36% minority figure, is based, however, on the minority work force within the City of New York.

The geographical limitation in the second figure is not supported in law or logic. The subject matter of the instant action is Local 14, not New York City. Many members of Local 14 reside in the suburban areas surrounding the City. To the extent that the minority work force figure to which the Local must strive is limited to residents of New York City, it is artificial. To the extent it is artificial, the pendulum swings from affirmative remedial relief under §706(g) of the Act to reverse discrimination under §703(j)*. There is no residency requirement for operating engineers within the City of New York but the trial court's judgment is based on just such a requirement or alternatively, on the inaccurate assumption that all members of Local 14 reside within the City.

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*The New York "Standard Metropolitan Statistical Area" [SMSA] includes the five boroughs and at least the counties of Nassau, Suffolk, Westchester and Rockland (PL's Ex 1, p. 363, 405, 441). Under the New York SMSA, the 1970 census data places the minority labor force over the age of 16 at 19% (PL's Ex 1, p. 363, 405, 441).

Conclusion

Based on the foreg ing, it is respectfully submitted that the order and judgment of the court below be reversed in all respects, or alternatively that the order and judgment be modified to the extent sought herein, or alternatively that the matter be remanded for a hearing on relief, together with costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,

DORAN, COLLERAN, O'HARA,
POLLIO & DUNNE, P.C.
Attorneys for Defendant-
Appellant, Local 14

RICHARD L. O'HARA
ROBERT A. KENNEDY
ALAN J. REARDON
ROBERT J. AURIGEMA
WILLIAM M. SAVINO
Of Counsel

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

- against -

LOCAL 14, et al,

Defendants-Appellants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 19th *day of* November *1976 at* ① 2401 East St., N.W. Washington D.C. ② 900 17th St. N.W., Wash. D.C. ③ 211 E. 43rd St., N.Y.C. ④ 330 Madison Ave. upon N.Y.C. ⑤ 262 W. 24th St. N.Y.C.

deponent served the annexed brief

① Equal Employment Opp. Comm. ② Bowker, Thompson, Kaplan, O'Connell ③ Harold R. Bassen ④ Shea Gould Climenko & Casey ⑤ Lawrence Morrison

the attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 19th *day of* November *1976*

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E. Thomas

Print name beneath signature

KEVIN E. THOMAS

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

- against -

LOCAL 14, et al,

Defendants-Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Velma N. Howe, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 298 Macon Street, Brooklyn, New York 11216. That on the 19th *day of* November *1976, deponent served the annexed* brief

upon Joseph Erskine *attorney(s) for*

the parties *in this action, at* 3513 Cooper Pl. Bronx, N.Y. 10475

the address designated by said attorney(s) for that purpose by depositing 2 *true copies of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 19th
day of November *1976.*

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4523156
Qualified in Queens County
Commission Expires March 30, 1978

Velma N. Howe

Print name beneath signature

Velma N. Howe